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ALEXANDER L. STEVAS,
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No. 82-1556

IN THE

Supreme Court of the United States

October Term, 1982

JOHN DUFFY, The Sheriff of San Diego County, California,
Petitioner,

vs.

THE BARONA GROUP OF THE CAPITAN GRANDE BAND OF
MISSION INDIANS, SAN DIEGO COUNTY, CALIFORNIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

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Capitan Grande Band of

Mission Indians, San Diego,

California.

Question Presented.

Are California's Bingo laws of a civil/regulatory nature within the meaning of Public Law 280 so that the Barona Indian Tribe may regulate its Bingo affairs on Indian Country pursuant to its ordinance free of state regulation?

Parties to the Proceedings.

This litigation was commenced by the filing of a complaint for declaratory and injunctive relief. Petitioner is John F. Duffy, Sheriff of the County of San Diego. Respondent is Barona Group of the Capitan Grande Band of Mission Indians, San Diego County, California.

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THE BARONA GROUP OF THE CAPITAN GRANDE BAND OF
MISSION INDIANS, SAN DIEGO COUNTY, CALIFORNIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 694 F.2d 1185 and is reprinted as Appendix A, and is repeated as Appendix A in Petitioner's Petition for Writ of Certiorari.

Jurisdiction.

The judgment of the Court of Appeals was entered on December 20, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutes Involved.

The pertinent Federal statutes involved are Public Law 280 codified as 18 U.S.C. §1162 and 28 U.S.C. §1360.

The pertinent State provisions involved are California Constitution, Article IV, §19; California Penal Code §326.5;

and San Diego County Code of Regulatory Ordinances, §§37.101-37.317. Both State and Federal statutory provisions are set out in Appendix B of Petitioner's Petition for Certiorari.

Statement of the Case.

Petitioner's Petition for Writ of Certiorari does not state fully all of the relevant facts in this case.

It is true that on April 20, 1981, the Tribe Council of the Barona Group enacted a tribal ordinance authorizing the playing of Bingo within the reservation. That tribal ordinance and management agreement provided in relevant part:

1. That the Barona Indian Group of the Mission Indian Tribe is a non-profit organization engaged in charitable, civic, community, benevolent, religious and scholastic work;
2. That the contractor with whom the Tribe contracted to manage the Bingo would operate same for the Tribe;
3. The Tribe's proceeds derived from Bingo *shall* be used for the support of programs "to promote the health, education and general welfare of its people". (Emphasis added).
4. It shall be unlawful for anyone to perform, conduct or operate Bingo on Indian Country except for the Tribe;
5. Bingo may be conducted every day of the week at the discretion of the Tribe;
6. All persons involved in the conduct of the games must be bona fide employees of the Tribe or contractor;
7. No one under the age of 18 shall be allowed to play Bingo;
8. Contractor shall give first preference to qualified members of the Tribe in hiring personnel;
9. Contractor to invest the necessary cost for construction of a facility to operate the Bingo Enterprise, which shall become the property of the Tribe.

While the Barona Group's Ordinance does not comply precisely with the San Diego Ordinance in that it set no limit on prize money for any single game, the San Diego Ordinance permits the same result by not limiting the number of games that may be played. While the Barona Group's Ordinance does not set time limits for hours of operation, the Barona Bingo establishment has not yet opened, hence, its hours of operation cannot be determined.

The Barona Ordinance requires that it be staffed by tribal members. First preference must be given to such members by contractor when hiring personnel. This hiring preference provision has in fact resulted in hiring only tribal members to operate the entire enterprise, and most of them have been out of work for the past two years.

Though the state law does not permit any person to receive a wage or salary from any Bingo games (other than security personnel), the Barona Ordinance and Management Agreement requires the hiring of tribal members and permits payment of a reasonable wage to all such employees.

The Barona Indian Bingo Enterprise will open to the public on April 15, 1983, in the Barona Tribal Community Center. Though contractor will invest the funds for the permanent facility, the Tribe shall have the first right of refusal to furnish the labor for such construction.¹

¹The President in his Indian Policy message of January 24, 1983, stated the administration intends to restore tribal governments to their rightful place among the governments of this nation . . . "to resume control over their own affairs." To that end, the President states:

"It is the policy of this administration to encourage private involvement, both Indian and non-Indian, in tribal economic development. In some cases, tribes and the private sector have already taken innovative approaches which have overcome the legislative and regulatory impediments to economic progress."

The President further stated that tribal governments should have the primary responsibility for meeting the needs and desires of their citizens and further that it is important that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of self-government. *Weekly Compilation of Presidential Documents*, Vol. 19, No. 4, page 98.

REASONS WHY THE WRIT SHOULD BE DENIED.

1. Neither the Decision Below, nor the Record, Raises the Question Presented in the Petition.

(a) Petitioner contends the question presented in the Petition is whether an Indian Bingo operation conducted on the reservation as a money making gambling business is contrary to California public policy. The issue presented to the Ninth Circuit was whether California public policy concerning legalized Bingo was civil/regulatory on the one hand or criminal/prohibiting on the other.

Petitioner's question assumes that only an Indian Bingo operation is conducted as a money making gambling business while all of the other 130 Bingo operations in San Diego County are not so operated.² If Bingo is gambling, it is no less gambling at the American Legion Hall than it is on Indian Country. If the Bingo receipts exceed the prizes plus expenses, that excess is money made whether it occurs at the American Legion Hall or on the Barona Reservation. If the American Legion uses the excess to run a child care day center then its child care day center is the result of a money making gambling business no differently than one run by the Barona Tribe from its Bingo Excess. The only difference between the two is that the American Legion has its private capital to create the operation, while the Indians "must encourage private involvement."

(b) Since the Barona Bingo operation has not yet opened for business, the record certainly cannot support Petitioner's position. At this point in time it cannot be said that it is a money making operation.

²The Bingo Bugle (San Diego Edition), March, 1983, listed 130 Bingo Programs Weekly with as many as 23 on any one evening. This only includes their advertisers. Investigation reveals there are many more.

2. The Barona Tribe Has a Right to Regulate Its Own General Civil Affairs.

(a) This Court has held that Public Law 280, codified as 18 U.S.C. §1162 and 28 U.S.C. §1360 was primarily intended to "redress the lack of Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the Courts of the States to decide such disputes." *Bryan v. Itasca County*, 426 U.S. 373 at 383; 96 S.Ct. 2102 at 2108. This Court, after further discussion, concluded that "if Congress in enacting Public Law 280 had intended to confer upon the States general civil/regulatory powers, including taxation of reservation Indians, it would have expressly said so." *Id.* at 390, 96 S.Ct. at 2111.

(b) The California Supreme Court has held that when an enactment follows voter approval, the ballot summary, arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language. *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208, 245; 149 Cal. Rptr. 239, 583 P.2d 1281 (1978). Appendix "A" is California Voters Pamphlet of the Primary Election of June 8, 1976, containing summary, arguments and analysis presented to the electorate. California's Bingo policy stems from a Constitutional Amendment; California Constitution, Article XVIII, §§1 and 4, permitting enactment after passage by a two-thirds majority of both the Senate and Assembly and popular vote of the people.³

³The People of the State of California, by an overwhelming majority of 70.2% voted in Proposition No. 9 (Bingo) on June 8, 1976. "Statement of Voters" — June 8, 1976. Primary Election, compiled by the Secretary of State, pursuant to California Elections Code §17121 at page 43.

The arguments made against Proposition 9, *i.e.*, corruption, failure to provide for licensing, failure to provide regulation of advertising, exorbitant salaries, distribution of profits, threat to crime-free society, aggressive organizations promote Bingo and reap a fortune, a no vote will discourage other forms of legalized gambling, immoral environment, etc. were all made in the California Voters Pamphlet. The argument in favor of the passage of Proposition 9 centered around the fact that Bingo is played "illegally daily" and passage would allow people to "play Bingo legally." This is a reflection of the intent of the People of California to legalize that which had previously been prohibited.

(c) Existing California law permits Bingo to be played by any labor, agriculture, or horticultural organization. California Revenue and Taxation Code §23701(a). It permits Bingo to be played in any lodge, by a fraternal society, or in any fraternal society providing for the payment of life, sickness, accident, or other benefits to members of such society. California Revenue and Taxation Code §23701(b). It permits Bingo to be played by corporations, community chests, or trusts organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, educational, fostering national or international sports, and prevention of cruelty to children or animals. California Revenue and Taxation Code §23701(e). It permits Bingo to be played by civic leagues, and organizations operated exclusively for the promotion of social welfare or local organizations of employees. California Revenue and Taxation Code §23701(g). It permits Bingo to be played by domestic, fraternal societies, orders, or associations operating under the lodge system. California Revenue and Taxation Code §23701(i). It allows Bingo to be played by mobile home park associations and senior citizens organizations. True,

that the profits of such games can be used only for charitable purposes, but as the Ninth Circuit Court of Appeals stated, the Barona Indian Tribe is no less a worthy charity than the above.

(d) The San Diego Ordinance itself states in §37.305 "Bingo Authorized" (Appendix B of Petition herein), that ". . . this Ordinance is adopted pursuant to §19 of Article IV of the California Constitution in order to make the game of *Bingo lawful* under the terms, conditions, and the following sections of this Chapter." (Emphasis added).

(e) Bingo in California is regulatory and not prohibitory because penalties are provided only when the Bingo games are not operated in accordance with the statute. A fine is provided in California Penal Code §326.5(c) only if any person receives or pays a profit, wage, or salary from any Bingo game. No other penalty is provided unless for a failure to operate the Bingo game in accordance with that section of the Penal Code.

3. Present Federal Policy Favors the Barona Indians.

Argument is made by Petitioner that there exists a clear violation of Federal Law. 18 U.S.C. §1955; *United States v. Farris*, 624 F.2d 890, 896 (9th Cir. 1980); *cert. denied*, 449 U.S. 1111 (1981).

The Justice Department has proposed a revision of the Federal Criminal Code and, in particular, a section that would have given states control of this conduct on Indian reservations. It would have added new §1166 to Title 18 U.S.C. as Part J of the proposed revision. Attached as Appendix B. However, same has been withdrawn and deleted from the provision revision, indicating an intent on

the part of the administration to protect this kind of revenue producing enterprise for the Indian.⁴

Conclusion.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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California.*

⁴*Indian News Notes* (Bureau of Indian Affairs), Vol. 7, No. 9, March 18, 1983, which reads as follows:

"Proposal to Give States Control of Reservation Gambling Deleted:"

"The intervention of Interior Secretary James Watts at the White House helped bring about the deletion, from a proposed revision of the Federal Criminal Code, of a section that would have given states control of gambling on Indian reservations. The proposed new section would have subjected Indian individuals, organizations and tribal governments to state laws with regard to licensing regulation and prohibition of gambling on Indian reservations. The Interior Assistant Secretary for Indian Affairs 'strongly opposed' the proposed new section in a memorandum to the Department's Legislative Counsel. The memorandum described the proposal as 'inconsistent with the President's Indian Policy Statement of January 24' which stressed the Tribe's governmental authority and responsibility on the reservations. The memo also noted the limited revenue-producing resources on reservations and concluded 'this kind of revenue-producing possibility should be protected and enhanced.'"

APPENDIX "A"

CALIFORNIA VOTERS PAMPHLET

June 8, 1976

Primary Election

PROPOSITION 9 BINGO

Ballot Title

BINGO. LEGISLATIVE CONSTITUTIONAL AMENDMENT. Permits Legislature to authorize cities and counties to provide for bingo games, but only for charitable purposes. Financial impact: None on state; nominal fiscal effects on cities and counties.

**FINAL VOTE CAST BY LEGISLATURE ON ACA 3
(PROPOSITION 9):**

ASSEMBLY—Ayes, 57

SENATE—Ayes, 27

Noes, 16

Noes, 11

Analysis by Legislative Analyst

PROPOSAL:

The Constitution prohibits lotteries in California. Bingo is a form of lottery if the players pay for a chance to win a prize.

This proposal would let the Legislature authorize cities and counties to permit bingo for charitable purposes.

FISCAL EFFECT:

Legislation has been enacted (Chapter 869, Statutes of 1975) which authorizes cities and counties to permit bingo conducted by charitable organizations for charitable purposes. Chapter 869 becomes operative upon adoption of this proposal by the voters.

Under Chapter 869, cities and counties will not receive any revenues from these games, but they may charge a license fee which cannot exceed its issuance cost. As a result, the local fiscal effect will be nominal. There is not state fiscal effect.

Argument Against Proposition 9

Commercialized bingo is big business.

Commercialized bingo is bad business.

Commercialized bingo is corrupting business.

Florida legalized bingo in 1967 and has experienced a flood of problems ever since. A Florida Legislative council report states, "Adoption of the State Bingo Law by the 1967 Legislature unleashed a torrent of questionable, if not illegal, gambling activities in Florida."

Iowa legalized bingo in 1973, and has been swamped by serious law enforcement problems. The Iowa Attorney General states that "... a dozen high-stake operations have sprung up and are doing a \$37 million a year business."

The California Attorney General's Task Force on Legalized Gambling has recommended 8 reasonable safeguards be written into the law, should commercialized bingo come to California. Proposition 9 ignores 4 of these safeguards, including mandatory licensing, statewide standards for regulation and conduct of games, limits on the frequency of games, and a statewide supervisory agency.

Proposition 9 fails to provide for mandatory licensing on bingo operations.

Proposition 9 fails to provide for the regulation of bingo advertising.

Proposition 9 fails to provide reporting and auditing procedures. This failure provides no controls over price of leases, exorbitant salaries, skimming, or the final distribution of bingo profits.

Proposition 9 fails to prohibit individuals with criminal records from running bingo games.

Proposition 9 fails to provide for statewide standards for bingo regulations. This failure will produce a crazy-quilt pattern of different bingo laws among different California cities.

The most glaring fault of Proposition 9 is that it fails to provide for a "Statewide Supervisory Agency." The Attorney General's Task Force on Legalized Gambling made this safeguard their final recommendation. Such an agency would protect California citizens against abuses, would give society a measure of control over gambling, and make bingo operators accountable.

Proposition 9 is a threat to a well-governed, crime-free society.

Many non-profit organizations in California oppose legalizing gambling in order to raise funds for "charity."

If Proposition 9 passes, Californians can brace themselves for a deluge of flamboyant advertising, promoting exotic prizes and a "something-for-nothing"

attitude toward life. Commercialized bingo could well become California's No. 1 headache.

If Proposition 9 passes, an aggressive organization could legally promote and operate bingo on a 24-hour, 7-day-a-week basis and reap a fortune.

Commercialized bingo poses serious social problems—especially among families with marginal incomes. "Grocery money" often ends up in the pockets of bingo operators. Gambling victimizes the poor and elderly.

Proposition 9 is badly written. It contains many loopholes. It will produce no tax revenue for the state.

Bingo does not belong in the California Constitution.

A NO vote on Proposition 9 will refer commercialized bingo back to the state legislature for more careful study and some reasonable safeguards.

A NO vote will discourage other forms of legalized gambling from entering California.

A NO vote will create a better moral environment in which to raise families.

A NO vote will make California a better state in which to live.

ROBERT H. BURKE
Member of the Assembly
73rd District

ALBERT S. RODDA
Member of the Senate
5th District

Rebuttal to Argument Against Proposition 9

The opponents say commercialized Bingo is big, bad, corrupt business. Is Bingo played "illegally" daily throughout California by churches, civic organizations and others big, bad, corrupt business?

The opponents point to a Florida law long since amended and the Iowa law which does not contain all our safeguards. Comparisons without merit. Neither these states nor approximately 26 others are about to give up their legalized Bingo.

The opponents refer to the Attorney General's Task Force on Legalized Gambling neglecting to state its conclusion. After reviewing all states that permitted Bingo the Task Force wrote: (pages 32-33) "The general opinion of both law enforcement and public administration authorities interviewed seems to confer approval on the legalization of Bingo for civic, religious and charitable purposes. On the whole, they felt that a properly regulated and conducted Bingo game presented no law enforcement problems of substance."

The opponents want more bureaucracy; statewide licensing, statewide regulation, limits on frequency of games and statewide supervision. Our Statute provides local control and supervision requiring an ordinance by the City or County before Bingo could be played.

A "no" vote will not prevent Bingo from being played. It is played illegally daily.

A "yes" vote will allow people to play Bingo legally. There will be no commercial profit. All proceeds go to charity.

Finally, opposition arguments concentrate on the Attorney General's Task Force Report—But the Attorney General does not oppose this measure. He has reviewed the Statute and finds no enforcement problems.

LEROY F. GREENE

Member of the Assembly, 6th District

Text of Proposed Law

This amendment proposed by Assembly Constitutional Amendment No. 3 (Statutes of 1975, Resolution Chapter 98) amends an existing section of the Constitution by adding a subdivision thereto. Therefore, the provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED AMENDMENT TO ARTICLE IV, SECTION 19

(c) Notwithstanding subdivision (a), the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes.

PROPOSITION 9 BINGO

Argument in Favor of Proposition 9

Proposition 9 deserves your favorable vote. This proposal will add a single sentence to our State Constitution making it possible to play bingo legally provided the proceeds are used for charitable purposes only.

It is presently illegal to play bingo anywhere in California under almost any circumstances.

The enabling act, AB 144 (1975), permits bingo games for charitable purposes where it is authorized by a local ordinance and conducted by nonprofit charitable organizations. All proceeds must be used for charitable purposes. The statute (AB 144) was written to preclude participation by the underworld. The charitable organization running the game must be recognized as a charity and exempt from

taxation by both State and federal government. The games must be conducted by members of the organization and no individual connected with the games can receive a salary, wage or profit from the conduct of such bingo games.

Opponents point to problems in other states long since corrected by those states. And unlike other states permitting bingo, this proposal does not permit bingo for profit.

Your favorable vote on Proposition 9 will allow those who wish to play an opportunity to play bingo while both enjoying themselves and benefiting charity.

LEROY F. GREENE

Member of the Assembly, 6th District

Rebuttal to Argument in Favor of Proposition 9

Citizens interested in a humane, responsive, crime-free society should vote NO on 9. Legalizing more gambling in California is a step backwards.

The argument that problems in other states have been "long since corrected" is inaccurate. In November of 1975, Florida officials reported to a Federal Gambling Commission: "The abuse of the State Bingo Law is widespread . . . A recent undercover investigation by the Public Safety Department disclosed that for every fifty bingo customers playing nightly, a \$1,000 skim of profits goes into the illegal operator's pockets, instead of to the charity as law prescribes. Bingo in Dade County run by professional gamblers now is estimated to produce approximately 4½ million dollars annually in skimmed profits and unreported income."

A NO vote will prevent this kind of corruption.

We are not against bingo. Social bingo and "donation" bingo are now legal in California. We do OPPOSE, however, commercialized bingo—especially unlicensed, unregulated, advertised operations. The enabling legislation contains legal loopholes because it ignores the key recommendations of the Attorney General's Task Force and fails to provide, therefore, meaningful controls.

After several long debates, the enabling legislation passed the Assembly committee by a 5-4 vote, and the Senate committee by a 6-5 vote. Proposition 9 barely got on the ballot.

Most reputable charities prefer to receive support from direct contributions, without depending on gambling profits. Many nonprofit organizations opposed Proposition 9 from its very beginning.

Join us in rejecting this legislation.

Vote NO on Proposition 9.

ROBERT H. BURKE

Member of the Assembly, 73rd District

ALBERT S. RODDA

Member of the Senate, 5th District

APPENDIX "B".

Sec. —(a) Chapter 53 of the United States Code is amended by adding a new section 1166 to read as follows:

“§1166. Gambling in the Indian country

“Whoever in the Indian country is guilty of any act or omission involving gambling (including the licensing, regulation, or prohibition thereof) which, although not made punishable by any enactment of Congress would be punishable if committed within the jurisdiction of the State in which the act or omission occurred, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(b) The analysis for chapter 53 of title 18 of the United States Code is amended by adding at the end thereof the following:

“§1166. Gambling in the Indian country.”